

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DWAYNE NELSON

Claimant

VS.

FLOYD'S DRAIN CLEANING

Respondent

AND

HARTFORD ACCIDENT & INDEMNITY

Insurance Carrier

AND

ACTION PLUMBING

Respondent

AND

INSURANCE COMPANY OF NORTH AMERICA

Insurance Carrier

DOCKET NO. 183,113

ORDER

ON the 22nd day of February, 1994, the application of the respondent, Action Plumbing, for review by the Workers Compensation Appeals Board of a Preliminary Hearing Order entered by Administrative Law Judge Floyd V. Palmer, dated December 30, 1993, came on before the Appeals Board for oral argument by telephone conference.

APPEARANCES

The claimant appeared by and through his attorney, Karen Rein of Lawrence, Kansas. Respondent, Action Plumbing, and its insurance carrier appeared by and through their attorney, Marcia Yates Gearheart of Kansas City, Missouri. The respondent, Floyd's Drain Cleaning, and its insurance carrier appeared by and through their attorney, Matthew W. Tills of Kansas City, Missouri. There were no other appearances.

RECORD

The record considered for purposes of this appeal consists of the documents filed of record with the Division of Workers Compensation in this docketed matter, including the transcript of the preliminary hearing held on December 14, 1993, before Administrative Law Judge Floyd V. Palmer and the exhibits attached thereto.

ISSUES

- (1) Whether the claimant sustained a personal injury by accident that arose out of and in the course of his employment with the respondent, Action Plumbing.
- (2) Whether claimant is entitled to aggregate the wages received from multiple part-time employments pursuant to K.S.A. 44-511(b)(7).
- (3) Whether aggregated wages should be apportioned between employer Floyd's Drain Cleaning, and employer Action Plumbing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- (1) The first issue raised by the respondent, Action Plumbing, during the oral argument on its application for review, is whether the claimant met with personal injury by accident arising out of his employment with the respondent, Action Plumbing.

The Administrative Law Judge, in his Order for Compensation dated December 30, 1993, found as follows:

- (a) Claimant worked for both Floyd's Drain Cleaning and Action Plumbing;
- (b) Claimant's average weekly wage for purpose of computing temporary total disability weekly benefits was found to be \$380.93 based on the aggregate wages from each employer.
- (c) The temporary total disability weekly rate of \$253.97 shall be paid twenty-seven percent (27%) by Action Plumbing and seventy-three percent (73%) by Floyd's Drain Cleaning.
- (d) Medical treatment shall be furnished by Spine Center in Kansas City.

The Appeals Board has jurisdiction to review a Preliminary Hearing Order in regard to a disputed issue of whether the employee suffered an accidental injury and whether the injury arose out of and in the course of the employee's employment. See K.S.A. 44-534a(a)(2).

In September of 1993, the claimant was working for both Floyd's Drain Cleaning and Action Plumbing performing drain cleaning service, repair and remodeling. Both of the employers were based out of the same location, but the claimant was paid separately by the employers. When claimant was called out to do a job he completed the job under either Floyd's Drain Cleaning or Action Plumbing depending on the instructions he received from the dispatcher.

On September 21, 1993, while performing a job for Floyd's Drain Cleaning, the claimant hurt his low back when he lifted a seventy-pound (70) sink machine while unplugging a drain in an apartment. This occurred during the daytime hours. At approximately ten o'clock the same evening, he received a call from Action Plumbing to perform work at a private residence. He drove to the residence and tightened a clamp on a sump pump with a no-hub wrench.

At the time that he made this call for Action Plumbing, his back was hurting him and he was wearing an airbrace to relieve the pain and to enable him to move around. The claimant was asked whether he injured himself on that job. He answered the question stating:

"It didn't help it any. Yeah, I was hurting afterwards a lot worse than when I went there, but I was hurting very bad when I went there."

The Appeals Board finds for preliminary hearing purposes that the claimant has established that he sustained an injury arising out of and in the course of his employment with the respondent, Action Plumbing, and therefore affirms in all respects the Order of Administrative Law Judge Floyd V. Palmer dated December 30, 1993.

(2) The other issues raised for review by the Appeals Board are issues dealing with the claimant's average weekly wage and what apportionment should be made to each employer concerning their respective liability to pay compensation under the Workers Compensation Act.

The Appeals Board finds that these two issues are not reviewable by the Appeals Board from a preliminary order as the Administrative Law Judge, pursuant to K.S.A. 44-534a(a)(2), has the authority to make an award of temporary total disability compensation which includes the amount of such compensation. In addition, he also has the authority pursuant to K.S.A. 44-503(a) to apportion the amount that each of the employers shall be liable to pay for compensation under the Workers Compensation Act.

AWARD

WHEREFORE, the Appeals Board hereby affirms in all respects the Order entered by Administrative Law Judge Floyd V. Palmer dated December 30, 1993, ordering temporary total disability benefits at the rate of \$253.97 per week commencing September 27, 1993, and continuing until further order of the Administrative Law Judge, or until claimant is certified as having reached maximum medical improvement, or until claimant is returned to gainful employment, whichever first occurs. Medical treatment is also ordered furnished to the claimant by the Spine Center in Kansas City.

IT IS SO ORDERED.

Dated this ____ day of March, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Karen Rein, PO Box 1265, Lawrence, KS 66044
Gerald E. Little, Jr., PO Box 1265, Lawrence, KS 66044
Matthew W. Tills, 801 Walnut, Suite 300, Kansas City, MO 64106
Marcia L. Y. Gearheart, 120 W 12th St., Suite 310, Kansas City, MO 64105
Floyd V. Palmer, Administrative Law Judge
George Gomez, Director